IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

MICHIGAN DEPARTMENT OF NATURAL RESOURCES

Docket No. 124413

Plaintiff/Appellee,

CARMODY-LAHTI REAL ESTATE, INC., a Michigan corporation,

Defendant/Appellant.

BRIEF ON APPEAL - APPELLANT

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STATEMENT OF THE BASIS OF JURISDICTION

Jurisdiction of the Michigan Supreme Court in this case is governed by MCR 7.301 and MCR 7.302. The Court of Appeal Opinion appealed from was issued June 3, 2003. Rehearing was denied July 21, 2003. Leave to Appeal to this Court was granted June 3, 2004.

STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS ERR WHEN IT FAILED TO FIND INTENT TO ABANDON THE RAILROAD EASEMENT AND IMPOSSIBILITY OF USE FOR RAILROAD PURPOSES, WHERE THE BUSINESS ALONG THE TRACKS CEASED TO EXIST, THE ICC HAD GRANTED ABANDONMENT OF RAIL SERVICE, THE TRACKS WERE REMOVED, ADJACENT PARCELS WERE SOLD AND THE LINE WAS SEVERED, AND THE EASEMENT ITSELF WAS SOLD AS AN ABANDONED PARCEL WITH NO RESERVATION OF FUTURE INTEREST FOR THE RAILROAD TO A NON-RAILROAD ENTITY (THE DNR)?

TRIAL COURT ANSWER: **NO**
COURT OF APPEALS ANSWER: **NO**
APPELLANT ANSWERS: **YES**

II. DID THE COURT OF APPEALS ERR WHEN IT APPROVED THE SALE OF THE RAILROAD EASEMENT TO A NON-RAILROAD ENTITY (THE MDNR) FOR NON-RAILROAD USES (A SNOWMOBILE TRAIL)?

TRIAL COURT ANSWER: **NO**
COURT OF APPEALS ANSWER: **NO**
APPELLANT ANSWERS: **YES**

PROCEDURAL BACKGROUND

Carmody-Lahti Real Estate Inc. was granted Leave to Appeal from the June 3, 2003 Michigan Court of Appeals decision affirming the April 4, 2002 Order Granting Summary Judgment to Appellee Michigan Department of Natural Resources, in the Houghton County Circuit Court. Carmody-Lahti requested rehearing in the Court of Appeals which was denied via an Order issued July 21, 2003.

Defendant-Appellant Carmody-Lahti Real Estate Inc. appealed the Order Granting Summary Judgment granted to Appellee Michigan Department of Natural Resources on April 4, 2002, by Judge Roy D. Gotham, acting as the Houghton County Circuit Court Judge by assignment.

The Trial Court determined upon Plaintiffs Second Motion for Summary Disposition, that Plaintiffs predecessor in title, the Soo Line Railroad, had not abandoned its railroad right-of-way easement, and thus, ruled that the Department of Natural Resources enjoys a valid and continuing right-of-way on the subject real property, based on the Trial Court's determination there was no genuine issue of material fact. The Court made its ruling as a matter of law.

Defendant Carmody-Lahti Real Estate Inc., had argued first, that the easement had been abandoned and thus, extinguished. Carmody-Lahti argued that since the easement had been extinguished, it had full fee ownership of the area of the easement, as the adjacent underlying property owner.

Second, Carmody-Lahti further argued that, even if the easement had not been abandoned, it

could not be transferred to another non-railroad entity and thus, the Michigan Department of Natural Resources could not enjoy a valid and continuing easement over the Carmody-Lahti land. Further, Carmody-Lahti argued that the railroad easement could not be utilized by the MDNR for non-railroad purposes, in this case, a snowmobile trail.

The Trial Court determined that the easement had not been abandoned, as a matter of law, and failed to really address the validity of transfer of the railroad easement.

This case was remanded to the Trial Court following reversal of its first Order for Partial Summary Judgment (Court of Appeals # 222645). In that appeal, it was ruled that the railroad right-of-way in question, which runs along the northern boundary of Defendant Carmody-Lahti's property, was an easement and not a fee simple. The case was remanded to allow the Trial Court to deal with the issues of abandonment and the import of the tax sale procedure. During the second round of summary disposition briefing and argument, it became apparent that both sides agreed that the tax sale had no real impact on the status of the railroad right-a-way, and both sides essentially dropped the argument.

The facts set forth below pertain particularly to the abandonment issue, at issue in this appeal. The facts that relate to the first appeal on the issue of whether the right of way is really an easement, are set forth in prior briefs filed in Michigan Court of Appeals file Number 222645 (Lower Court File Number 97-10318-PZ).

Other than in regard to the location of the property line, which was litigated, the facts in this case were stipulated. Please see the Plaintiff's "Brief in Support of Plaintiff's Motion for Summary

Disposition" dated December 11, 1998, and Defendant's "Brief in Support of Cross-Motion", dated 01/18/99, and also Response and Brief of Defendant/Counter Plaintiff Carmody-Lahti Real Estate, Inc. to DNR's Motion in Brief for Summary Disposition dated 02/01/99. These facts are set forth below.

FACTS

The Soo Line Railroad sought and received a Certificate and Decision from the International Commerce Commission (now the Surface Transportation Board of US Department of Transportation), on September 29, 1982, granting permission to abandon the railroad line that had run along the northern border of Defendant Carmody-Lahti Real Estate Inc.'s residential apartment building property. (Appendix 20a). The Soo Line Railroad traces its easement to 1873, when it was originally granted to the Mineral Range Railroad. (Appendix 12a is a photocopy of the actual deed; Appendix 15a is a typed transcription which has been used in this litigation). The railroad and the right-of-way had changed hands several times, and in 1988, the Soo Line Railroad purported to deed that right-of-way to the Michigan Department of Natural Resources. (Appendix 18a). The grant does not reserve rights to the railroad, nor preserve any future interest for potential railroad purposes. The DNR placed a snowmobile trail upon the easement. Just prior to the filing of this litigation, Carmody-Lahti fenced the abandoned easement, and the MDNR moved the snowmobile trail to the north, where it continues to operate to this day.

The railroad easement as granted in 1873 runs 20 feet north and 80 feet south of Carmody-Lahti's northern boundary line. The 1873 deed granting right-of-way contains multiple statements as to the interest being conveyed. Since the right-of-way was intended to be an

easement, a description of the purposes, or limitations of use, was included. The document variously states:

1. "a right of way for the railroad",
2. "a right of way for said railroad",
3. mineral rights are reserved with the right to mine "in which manner as not to interfere with the construction or operation of said railroad."
4. "... to have and to hold the said strip of land with the appurtenances, for the purpose and uses above stated and subject to the reservations aforesaid..." (typed version of original hand-written deed is attached, with underlined emphasis added). (Appendix 15a)

The Soo Line purported to sell only 15 feet to the south of the Carmody-Lahti lot line, to the Michigan DNR. (Appendix 18a). The remaining 65 foot strip on the Carmody-Lahti land was sold to Main Street, Inc., a local economic development organization, which has done nothing to exert any property rights to said strip, to date.

Rail service on the railroad easement terminated long before the tracks themselves were actually removed.

While the exact date has not been established, both parties concede that the railroad tracks were actually removed by the time the strip was sold to the DNR in 1988. No railroad has operated in that location since. In fact, until the snowmobile trail use began, the property was not used for any purpose.

The Soo Line Railroad paid no taxes in regard to the easement at issue. However, no taxes were assessed.

Before the underlying property was acquired by Defendant Carmody-Lahti, it was owned by the Armstrong-Thielman Lumber Company, which operated a lumber operation next to the railroad tracks. The buildings and installations of the lumber company have long since been torn down, and rails used by them have been taken up. By 1988, the Soo Line Railroad purported to sell its right-of-way, via a deed transferring the "abandoned railroad right of way" to the MDNR. (Appendix 18a).

Defendant Carmody-Lahti argues that the property was abandoned because of non-use, together with actions clearly showing an intent to abandon, and that it is no longer possible to use the easement for railroad purposes. Thus, the easement is extinguished and no longer burdens the Carmody-Lahti property.

ARGUMENT

Defendant-Appellant Carmody-Lahti Real Estate Inc. sought Leave to Appeal the Michigan Court of Appeals' Unpublished June 3, 2003 decision, specifically to address the difference between an interest held in fee, and the railroad right-of-way in question, which has been previously determined to be an easement (please see Opinion in prior Appeal, decided June 5, 2001 COA No. 222645). Carmody-Lahti believes the essence of the difference to be that an easement is a right of use, and therefore, limited to specific purposes (here, railroad purposes). The Court of Appeals misapplied a test which included all lawful uses, and applied principles of fee simple property interests which are not appropriate to consideration of abandonment of an

Easement. When intent to abandon these purposes is shown, and/or the purposes become impossible, the easement is extinguished.

I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO FIND INTENT TO ABANDON THE RAILROAD EASEMENT AND IMPOSSIBILITY OF USE FOR RAILROAD PURPOSES, WHERE THE BUSINESS ALONG THE TRACKS CEASED TO EXIST, THE ICC HAD GRANTED ABANDONMENT OF RAIL SERVICE, THE TRACKS WERE REMOVED, ADJACENT PARCELS WERE SOLD AND THE LINE WAS SEVERED, AND THE EASEMENT ITSELF WAS SOLD AS AN ABANDONED PARCEL WITH NO RESERVATION OF FUTURE INTEREST FOR THE RAILROAD TO A NON-RAILROAD ENTITY (THE DNR).

Standard Of Review. Review of a trial court's ruling in favor of a motion for summary disposition is de novo, with the reviewing court reviewing the record to determine whether the moving party was entitled to judgment as a matter of law. Adkins v. Thomas Solvent Co, 440 Mich 293, 302; 487 NW2d 715 (1992); Borman v. State Farm Fire & Casualty Co, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994); North Community Healthcare, Inc. v. Telford, 219 Mich App 225; 556 NW2d 180 (1996).

The essence of an easement is described as simply one person's right to use the land of someone else for a specified purpose. Eyde v. State, 82 Mich App 531, 267 NW 2d 442 (1978). The holder of the easement is entitled to possession only to the extent necessary to the full enjoyment of the rights conferred by the easement. Morrill v. Mackman, 24 Mich 279 (1872). The Restatement of Property defines "easement" as:

> "An easement is an interest in land in possession of another which
> (a) entitles the owner of such interest to a limited use or
> enjoyment of the land in which the interest exists;..."
> Restatement of Property, Section 450 at 2901 (1944)

The validity of the grant of an easement may be tested by determining whether there is "a right vesting in a grantee to use land of another for a specific purpose consistent with a general

property in the other owner." Nicholls v. Healy, 20 Mich App 393, 393, 174 NW2d 43, 44 (1969), *after remand*, 37 Mich App 348, 194 NW2d 727 (1971).

Abandonment of a railroad easement is thoroughly described by Judge Bell in the trial court opinion Belka v. Penn Cent. Corp., 1993 U.S. Dist. LEXIS 15836 (W.D. Mich. October 14, 1993), affirmed, 74 F.3d 1240 (6th Cir. (Mich.) Jan 10, 1996). (Appendix 22a and 29a). Belka reviewed the difference between an easement and a fee at the outset, and found the interest to be an easement. The Belka opinion then proceeds to interpret Michigan law, which it finds controlling as to whether a railroad has abandoned its property interest. Because the facts of Belka are so close to the instant case, the District Court Opinion is well worth reviewing.

The Opinion observes:

> "As a general rule, an easement granted for a particular purpose terminates as soon as the purpose for which the easement was granted ceases to exist, is abandoned, or is rendered impossible. MacLeod v. Hamilton, 254 Mich. 653, 656, 236 N.W. 912 (1931). See generally, 1 Cameron, Michigan Real Property Law, 2d ed., § 6.28 p. 217 (1993)...."
>
> "...The grants in this case grant a right of way to the railroad "FOREVER". They contain no defeasance clause. In the absence of a defeasance clause these easements, like the easements discussed in Ludington & N.Ry. v. Epworth Assembly, 188 Mich. App. 25, 33-34, 468 N.W. 2d 884 (1991), [*9] appeal denied, 439 Mich. 934 (1992), will not terminate upon a mere showing of non-use. To quiet title Plaintiffs must show either abandonment or impossibility."
>
> "...Whether Defendants intended to abandon their property rights cannot be determined without consideration of the nature of that property interest. Defendants did not own a fee simple interest in the railroad corridor. They had an easement to use it "for railroad purposes."

> Accordingly, the issue for this Court is not whether Defendants intended to abandon some nebulous concept of "property rights", but whether they intended to abandon their right to use the property "for railroad purposes"."

The Belka Court found an unmistakable intent to abandon the use of the right-of-way for railroad purposes where the railroad has terminated railroad operations under the Regional Rail Reorganization Act, removed the tracks, sold parcels of the rail corridor and in doing so severed the line, and has shown an inability to operate the railroad, and finally, has made efforts to sell the right-of-way. The court concluded that all of these indications combined show an unmistakable intent to abandon the use of the right-of-way for railroad purposes. Since the easement had been given for a railroad right-of-way, said easement has been abandoned.

Further, the Belka easement was also found to be extinguished due to impossibility of use. The Belka Court followed Michigan law which provides that an easement ends when its purpose becomes impossible. Because the railroad corridor had been severed by sale of various parcels for non-railroad use (apparently, many to municipalities), the easement could no longer be used as a rail line, and the underlying easement terminated via abandonment of the property interest (ie., the right of use for a railroad).

Jones v Van Bochove, 103 Mich 98 (1894) at 101-102 indicates that nonuse of the easement, combined with other acts indicating abandonment, will constitute abandonment and termination of the easement. Carmody-Lahti has never argued that mere non-use, alone, for railroad purposes constitutes abandonment of a railroad right-of-way easement. Rather, we argue that the intent to abandon is shown by the following collectively:

1. The old Armstrong Thielman Lumber Company, which operated a lumber operation utilizing the railroad track, had long since gone out of business, and the buildings and installations of the lumber company had long since been torn down. The land was then acquired by Carmody-Lahti who used it for apartment buildings. A building and parking lot are located partially on the right-of-way.
2. The Soo Line had applied to the ICC for permission to abandon, which was granted.
3. The Soo Line had removed the railroad tracks from the right-of-way.
4. The Soo Line had sold off adjacent parcels, severing the rail corridor and making it impossible to use as a railroad.
5. The Soo Line had sold the easement in question to a non-railroad entity for non-railroad purposes (to the Department of Natural Resources for a snowmobile trail and to Main Street, Inc. for unspecified purposes).
6. The Soo Line had not paid taxes.
7. The railroad had not carried out periodic inspections or any other type of activity at the property.
8. The 1988 Quit-Claim Deed contains no reservations of rights in the event the Soo Line ever wishes to reconstruct its railroad operation, and uses the term "abandoned railroad right-of-way" to describe the interest being sold.

The facts in the instant case are closest to the facts in Jones, where abandonment was found due to the failure of the business for which the railroad was constructed, sale of the land which had been used for the business together with its buildings and having buildings torn down, removal of the bridge over the river over which the railroad passed, taking up the iron rails and selling

them, taking up some of the ties and allowing others to take up ties, and allowing the fences enclosing the railroad strip to decay. Jones at 99.

Not only have the Armstrong Thielman buildings disappeared, but Carmody-Lahti Real Estate has constructed three apartment buildings, together with parking lot and garages, on their property, the third building and parking lot being located on the former railroad right-of-way.

The facts of Belka are also very close to the case at hand. The impossibility of use of the easement is just as apparent on the Carmody-Lahti property as it was on the Belka property. (see argument above).

Carmody-Lahti has never argued that the right-of-way for railroad purposes could not be sold to another entity (indeed it has been sold between railroads in the past). However, it is a right-of-way for railroad purposes, and that is all a buyer would acquire. In this instance, the intent of the sale, to the MDNR was for non-railroad purposes, providing the final indication of the Soo Line's intent to abandon.

In City of Boyne City v. Crain, 179 Mich App 738, 746; 446 NW2d 348 (1989), the Court found that the defendants had no access to the parcel in question so they could not run a railroad there, since the adjacent parcels had been sold (which had formerly provided the access on one continuous rail line). The easement had become landlocked by sale of parcels in the rail corridor, therefore, the easement lapsed because it no longer could be used as a railroad.

In Anderson v. Schmidt, 16 Mich App 633, 635; 168 NW2d 437 (1969), Plaintiff had an easement for access to a boathouse, which collapsed after 16 years of non-use; Plaintiff did not have the right to re-build his boathouse so the ultimate purpose for the right of ingress and egress became impossible and the easement terminated.

In its June 3, 2003 decision, the Michigan Court of Appeals examined each indication of abandonment alone, and determined each to be insufficient by itself. The above-cited cases establish that Michigan case law requires an examination of the totality of the indications, collectively, when a court assesses a railroad's intent to abandon its easement. Under the test of Jones, Belka, Boyne City and other cases, the Soo Line abandoned its easement and/or rendered its use for railroad purposes impossible.

> "Upon abandonment, land taken by a railroad pursuant to a voluntary grant or donation reverts to the grantor or donor or his heirs, representatives or assigns. Westman, 183 Mich. App. at 495 (citing Quinn, 256 Mich. at 149)." [Citation is to Westman v. Kiell, 183 Mich. App. 489; 455 N.W. 2d 45, appeal denied, 437 Mich. 880 (1990).]

Where the right-of-way has been extinguished by abandonment and also by impossibility and where the underlying property owners are the assignees of the original grantors of the easement for right-of-way, title to the lapsed right-of-way must be quieted in said underlying land owners (Carmody-Lahti).

II. THE COURT OF APPEALS ERRED WHEN IT APPROVED THE SALE OF THE RAILROAD EASEMENT TO A NON-RAILROAD ENTITY (THE MDNR) FOR NON-RAILROAD USES (A SNOWMOBILE TRAIL).

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In the first Court of Appeals Opinion it was determined that these phrases indicated the establishment of an easement, as opposed to a fee interest. It does not follow that this easement can be bought and sold with no restrictions on use, as would a fee interest. Rather, the purpose of the easement constitutes the property interest. Thus, any sale must be for the intended use.

The case law cited in the June 3, 2003 Court of Appeals Opinion does not support the outcome. The Opinion relies on Quinn v Pere Marquette R Co., 256 Mich 143; 239 NW 376 (1931). As has been acknowledged on all sides and by this Court, Quinn is not an easement case, but rather,

is discussing a fee simple interest. Thus, the application of the "mere statement of purpose" concept which applies to a fee, to the easement in this case, is misplaced. A statement of purpose is the essence of an easement, as argued above and as stated in the Restatement of Property, Section 450 at 2901 (1944); Belka v. Penn Cent. Corp., 1993 U.S. Dist. LEXIS 15836 W.D. Mich. October 14, 1993, affirmed 74 F.3d 1240 (6th Cir. (Mich.) Jan 10, 1996); Anderson v. Schmidt, 16 Mich App 633, 635; 168 NW2d 437 (1969); and City of Boyne City v Crain, 179 Mich App 738, 746; 446 NW2d 348 (1989).

> "An easement must be used strictly for the purposes for which it was granted or received. The owner of an easement cannot materially increase the burden of it or impose a new and additional burden upon the servient tenemant."

Delaney v Pond, 350 Mich 685, 687; 86 NW2d 816 (1957).

Where a railroad company has received an easement for railroad purposes, it would clearly be a change in use and in this case an increase in the burden, to transfer that easement to a non-railroad company for non-railroad use (ie., for a snowmobile trail). The nature and uses of a snowmobile trail are very different from the railroad. The only time that the owners of the servient property would be bothered by the use of the railroad easement would be when a train was going by. When the use is changed to become a recreational trail, there is constant noise from snowmobiles in the winter time, recreational four-wheel vehicles in the summer time, and other varied use by the public at all times (snowmobile trails are perceived as public areas and may be used for walking, underage parties, etc.). By bringing the public into the right-of-way, a new security problem is also created for the servient owners.

Since the use is changed and the burden increased when the railroad operation is abandoned and the right-of-way sold for a snowmobile trail, the sale should be invalidated and this Court should rule that the easement has been abandoned and extinguished.

In the event that this Court approves a sale of a railroad right-of-way easement to a non-railroad entity, the easement is not automatically transformed into something useful to the non-railroad entity. In other words, it is still an easement for a railroad and thus, of little use for the building of houses, snowmobile trails, roads, utilities, factories, parks, and the like. If the Soo Line Railroad has not established an intent to abandon its easement for railroad, then that is what it has available to sell and that is what the DNR bought. Any use as a snowmobile trail should continue to be enjoined.

RELIEF REQUESTED

Defendant-Appellant Carmody-Lahti respectfully requests that this Honorable Court rule that the railroad easement was abandoned and rendered impossible to use by the Soo Line Railroad and thus extinguished and that the Carmody-Lahti parcel is no longer burdened by the railroad right-of-way, and remand for entry of judgment accordingly. In the event that this Court finds no abandonment and no impossibility, uses of the easement beyond railroad purposes should be enjoined.

Respectfully submitted,

BRIDGES AND BRIDGES

Dated: May 21, 2004

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